FILED

OCT 30 '98

ALEXANDER L. STEVAS
CLERK

No. 98-31

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

CABLEVISION SYSTEMS DEVELOPMENT COMPANY
AND
CABLE TELEVISION SERVICES CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

AND

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS LOCAL UNION 25,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

BRIEF FOR INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 25 IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-81

CABLEVISION SYSTEMS DEVELOPMENT COMPANY
AND
ATLANTIC CABLE TELEVISION SERVICES CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

AND

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 25,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 25 IN OPPOSITION

QUESTION PRESENTED

Whether a cable television company which had previously subcontracted two of its many services, and

which subsequently terminated the subcontracting relationship and hired the subcontractor's employees, can be deemed a successor to the subcontractor under the National Labor Relations Act, when the operations, insofar as they affect the employees, are essentially the same after being taken over by the cable television company.

ARGUMENT

NO CONFLICT EXISTS BETWEEN THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND THE DECISION OF THIS COURT IN *NLRB v. BURNS INTERNATIONAL SECURITY SERVICES, INC.*, 406 U.S. 272 (1972)

The Petitioner argues that the decision of the United States Court of Appeals for the Second Circuit is inconsistent with this Court's decision in *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), and with decisions of other appellate courts, because the Second Circuit "overlooked the critical successorship requirement emphasized by this Court in *Burns*, that both firms operate in the same industry." (Pet. 5) This argument fails for two reasons: First, as a factual matter, in this case both the successor and predecessor employers were in the same industry. Second, as a legal matter, this Court in *Burns* did not establish a requirement that both firms operate in the same industry.

A. As the NLRB and the Second Circuit found, Cablevision is a company engaged in the development, maintenance and operation of cable television. (Pet. 4a-5a, 12a) Cablevision subcontracted certain installation and maintenance functions to Broadway Maintenance Corporation and later formed Atlantic Cable Television

Services to take over the operations performed by Broadway. (Pet. 5a) Thus both Cablevision, Atlantic and Broadway were operating in the cable television industry, and Atlantic was engaged in precisely the same business as Broadway.

Moreover, as the Second Circuit noted, "the relevant comparison is not between Cablevision and Broadway on a total basis, but between the specific operations involving the union members." (Pet. 7a) In this case, the Petitioner does not dispute the Second Circuit's finding that "the operation, insofar as it affect[ed] the union members . . . was essentially the same after Cablevision took it over as it had been under Broadway." (Pet. 7a)

B. Although petition refers generally to *Burns* for the proposition that a predecessor and successor must operate in the same industry, *Burns* does not establish such a requirement. In *Burns* this Court stated,

> [W]here the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation of the express mandates of § 8(a)(5) and § 9(a) by ordering the employer to bargain with the incumbent union.

406 U.S. at 281. Thus *Burns* refers not to the identity of the industry in which the predecessor and successor are engaged but to the similarity of the bargaining unit before and after a change of employers. In the instant case the bargaining unit was not changed by a change of employers, and Petitioner does contend that the unit was changed.

Although the Petitioner suggests that a conflict exists between the decision of the Second Circuit and the decisions of other courts, no such conflict exists. In

Machinists v. NLRB, 414 F.2d 1135 (D.C. Cir. 1969), cited by Petitioner, the Board and the D.C. Circuit concluded that two employers were not successors because of a "substantial nondiscriminatory change in personnel" and because the operations as they affected the employees were "significantly altered." *Id.* at 1138. And, the D.C. Circuit subsequently held that the "essential inquiry is whether operations, as they impinge on union members, remain essentially the same after the transfer." *Electrical Radio and Machine Workers v. NLRB*, 604 F.2d 689, 694 (D.C. Cir. 1979).

In *NLRB v. Middleboro Fire Apparatus, Inc.*, 590 F.2d 4 (1st Cir. 1978), also cited by Petitioner, the First Circuit concluded that one employer was the successor of another because the employer performed the same services on the same premises, using the same tools, equipment and employees, who exercised the same skills. And in *NLRB v. Alamo White Truck Service*, 273 F.2d 238 (5th Cir. 1959), the court held that one employer was not the successor of another because of "the difference in policies, operations, personnel and employer-employee relationship." *Id.* at 242.

Thus the "critical successorship requirement" (Pet. 5) is not, and has never been, that both firms operate in the same industry and no conflict, therefore, exists between the decision of the Second Circuit and this Court's decision in *Burns*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 20, 1982